BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

DENNIS RAY McCAUGHTRY	)	
Claimant	)	
VS.	)	
	)	Docket No. 242,580
CONKLIN CARS	)	
Respondent	)	
AND	)	
	)	
FIRE & CASUALTY INSURANCE COMPANY and	)	
FEDERATED MUTUAL INSURANCE COMPANY	)	
Insurance Carriers	)	

ORDER

Respondent and one of its insurance carriers, Fire & Casualty Insurance Company, appeal the February 28, 2001 Award of Administrative Law Judge Bruce E. Moore. Claimant has alleged accidental injuries on January 31, 1998, while respondent's workers' compensation insurance coverage was provided by Federated Mutual Insurance Company, and on February 10, 1999, while respondent's insurance coverage was provided by Fire & Casualty Insurance Company. The Administrative Law Judge found claimant's work disability stemmed from the later injury. Respondent and Fire & Casualty Insurance Company dispute that finding. The Board held oral argument on September 4, 2001.

APPEARANCES

Claimant appeared by his attorney, Dale V. Slape of Wichita, Kansas. Respondent and its insurance carrier Fire & Casualty Insurance Company appeared by their attorney, Terry J. Torline of Wichita, Kansas. Respondent and its insurance carrier Federated Mutual Insurance Company appeared by their attorney, Vincent A. Burnett of Wichita, Kansas.

RECORD AND STIPULATIONS

The Appeals Board (Board) has considered the record and adopts the stipulations contained in the Award of the Administrative Law Judge.

At oral argument, the parties acknowledged that the issue dealing with claimant's entitlement to temporary total disability compensation for the period May 26, 1999, to July 2, 1999, had been resolved, with the claimant being entitled to 5.43 weeks of temporary total disability from the February 10, 1999 accident. The Administrative Law Judge's Award on that issue is, therefore, affirmed. Additionally, claimant acknowledged he is no longer claiming a series of injuries through February 10, 1999, but instead is alleging two separate accidents on the above-listed dates.

ISSUES

(1) Did claimant suffer additional injury as a direct and natural consequence of his original injury of January 31, 1998, or did claimant instead suffer a new and separate accident on February 10, 1999?

(2) What is the nature and extent of claimant's injury and/or disability as it relates to the above dates of accident?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the entire evidentiary file contained herein, the Board finds that the Award of the Administrative Law Judge should be modified.

The Administrative Law Judge awarded a 2 percent functional impairment to claimant for the January 31, 1998 accident, with a 3 percent impairment of function allocated to the February 10, 1999 accident, both based upon Dr. Brown's total rating of 5 percent to the body as a whole. The Board agrees with and adopts the Administrative Law Judge's findings regarding claimant's functional impairment. The Administrative Law Judge found that any work disability associated with these injuries should be assessed against the insurance carrier with the coverage for the second date of accident, as that was the accident which led to claimant's specific work restrictions and limitations. The Board again agrees.

The claimant in this case returned to work for respondent after the first accident with restrictions from Ms. Huntley, a physician’s assistant, from StatCare. He was earning a comparable wage and performing that job, although with self-accommodation. After suffering the second accident, claimant was no longer capable of returning to work and suffered an increased impairment of function.

It is acknowledged that C. Reiff Brown, M.D., an orthopedic surgeon who examined claimant, testified that, in his opinion, the same restrictions he imposed after the second injury would have been appropriate after the first. However, Dr. Brown testified that the

second accident was the most significant of the two. Also, claimant was able to continue working his regular job, although with restrictions, until the second injury occurred.

Fire & Casualty Insurance Company contends the significant dispute in this matter was addressed in *Surls*.[1] In *Surls*, the claimant suffered accidental injury to his back while working for Saginaw Quarries in January of 1996. He was treated by Edward J. Prostic, M.D., and provided specific restrictions of 50 pounds on a single lift, with no lifting greater than 20 pounds on a repetitive basis and limited work above eye level. Claimant returned to work for Saginaw Quarries for approximately two months, but then was transferred to a different employer, Neosho Construction Company (Neosho). While working for Neosho, claimant suffered a second injury, on May 17, 1996. After undergoing conservative treatment, claimant returned to Neosho with the same work restrictions as had originally been recommended after the first accident. The Court of Appeals, in *Surls*, first reaffirmed the finding in *Helms*,[2] which states:

> If an employee sustains a subsequent injury which is found to be a new injury, the insurer at risk at the time of the second injury is liable for all of the claimant's benefits.[3]

However, the court, in *Surls*, noted that the fact-finder had found the first injury essentially set the level of disability. The fact that claimant suffered a later injury with the second employer did not relieve the original employer of liability. Additionally, the court found the second injury had no effect on claimant's limitations. The court stated:

> Saginaw is essentially in the same position as if Neosho had not intervened. Had there been some significant increase in work restrictions caused by the second accident, we might have a different result.[4]

In *Surls*, the claimant suffered injury while working for Saginaw and returned to work with specific restrictions. Here, claimant suffered injury while working for respondent on the first date of accident and returned to work with restrictions from Ms. Huntley of StatCare. There is no indication in the record those restrictions were ever lifted. In *Surls*, the claimant went to work for a second employer, i.e., Neosho, and suffered a second injury. Here, claimant continued working for respondent and suffered a second injury on

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[1] *Surls v. Saginaw Quarries, Inc.*, 27 Kan. App. 2d 90, 998 P.2d 514 (2000).

[2] *Helms v. Tollie Freightways, Inc.*, 20 Kan. App. 2d 548, 889 P.2d 1151 (1995).

[3] *Surls*, at 95.

[4] *Supra*, at 96.

February 10, 1999, when Fire & Casualty was the insurance carrier providing workers' compensation coverage for respondent.

In *Surls*, the claimant was released after the second injury with the same restrictions as had been placed upon him after the first. Here, Dr. Brown testified that, in his opinion, the same restrictions imposed after the second injury would likewise have been appropriate after the first. However, claimant never returned to work for respondent under those restrictions.

The Board concludes that *Surls* does not apply in this instance. Here, claimant returned to work at a comparable wage, performing the same job, although with self-accommodation prior to the second injury. As claimant was earning wages equal to or greater than 90 percent of his average weekly wage that he was earning at the time of the injury, claimant would be entitled to no work disability after the first accident unless and until he ceased earning at least 90 percent of his average weekly wage.[5]

Additionally, the Kansas courts have historically applied the "last injurious exposure" rule to situations where a claimant suffers more than one injury. Under this rule, the liability is assessed to the carrier covering the risk at the time of the most recent injury that bears a causal relationship to the original disability. If an employee sustains a subsequent injury which is found to be a new injury, the insurer at risk at the time of the second injury is liable for all of claimant's benefits.[6]

The Board affirms the Administrative Law Judge's finding that the accident of February 10, 1999, was a "new" injury and that the liability for any work disability awarded herein should be assessed to Fire & Casualty Insurance Company from that date of accident.

The Administrative Law Judge went on to find that *Watkins*[7] applies to this circumstance, as claimant had returned to unaccommodated work at a comparable wage following the first accident. However, as noted above, while claimant did return to work earning a comparable wage, he was under specific restrictions by Ms. Huntley and self-accommodated as a result of those restrictions. Therefore, the Board finds that the court's rationale in *Watkins* does not apply to this circumstance.

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[5] K.S.A. 1998 Supp. 44-510e(a).

[6] *Helms , supra.*

[7] *Watkins v. Food Barn Stores, Inc.*, 23 Kan. App. 2d 837, 936 P.2d 294 (1997).

Additionally, the Board has held in the past that the logic of *Watkins* does not apply to the present version of K.S.A. 44-510e because it defines permanent partial general disability entirely differently from the version addressed by the Kansas Court of Appeals in *Watkins.*[8]

> The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury.[9]

The Board affirms the finding of the Administrative Law Judge that claimant suffered a 21 percent task loss as a result of the injuries suffered on February 10, 1999. This is based upon the opinion of Dr. Brown, who provided the only task loss opinion in the record.

Claimant testified during the period March 1, 1999, through May 1, 1999, he was receiving unemployment. However, he acknowledged that he did not look for work during that period of time as he was on return status with respondent. The Board questions claimant's ability to collect unemployment while making no attempt to seek additional employment and finds claimant's efforts during this period of time did not constitute a good faith effort.[10] In this regard, the Award of the Administrative Law Judge is modified to include additional periods of time wherein a wage will be imputed under K.S.A. 1998 Supp. 44-510e.

As noted by the Administrative Law Judge, claimant conducted what could be only described as a limited job search during the period August 9, 1999, to August 5, 2000. In each case, where claimant spoke with someone by telephone while applying for a job, claimant would disclose restrictions from his treating physician. However, claimant was under no work restrictions from Bernard T. Poole, M.D., in August of 1999, and the restrictions of Ms. Huntley were only temporary. The first permanent work restrictions placed upon claimant were done by Dr. Murati after the November 9, 1999 examination, by which time claimant had stopped applying for line mechanic jobs altogether.

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[8] *Sharp v. Custom Campers, Inc.*, No. 251,629, 2002 WL 31253320 (Kan. WCAB Sept. 30, 2002); *Tallman v. Case Corporation*, No. 265,276. 2002 WL _____ (Kan. WCAB Nov. 27, 2002).

[9] K.S.A. 1998 Supp. 44-510e(a).

[10] *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

After a brief, failed attempt to run a computer business, claimant began running an escort service on January 21, 2000. This business was originally run by his sister and brother-in-law in Wichita. As noted in the Award, the escort service was characterized as a situation where claimant, as a broker, would arrange "dates" between his "employees" and "gentlemen". No additional explanation was provided. This enterprise was unsuccessful and closed July 7, 2000. Claimant lost money on the enterprise.

Based upon the policies set forth by the Kansas Court of Appeals in *Copeland*,[11] the Board finds claimant did not put forth a good faith effort to obtain employment for the period August 9, 1999, through August 4, 2000, after which time he accepted employment with "Bes In The Wes Trucking".

The Board finds that claimant had the ability to earn $280 per week pursuant to the testimony of Jerry Hardin prior to his accepting the job with "Bes In The Wes Trucking". Claimant would, therefore, have a wage loss of 60 percent for the period February 28, 1999, through August 4, 2000. Thereafter, from August 5, 2000, to November 2, 2000, claimant would have a wage loss of 38 percent based upon his actual earnings as a truck driver.

Claimant would, therefore, have a work disability for the period February 28, 1999, through August 4, 2000, in the amount of 40.5 percent. This amount would then reduce to 29.5 percent for the period August 5, 2000 to November 2, 2000.

The parties have acknowledged that, as of November 3, 2000, claimant began working with Snow Line Express Trucking at a comparable wage and, therefore, as of that date, the permanent partial disability award should be limited to his percentage of functional impairment.[12]

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Bruce E. Moore, dated February 28, 2001, should be, and is hereby, modified, and an award is, therefore, granted in favor of claimant Dennis Ray McCaughtry and against respondent Conklin Cars and its insurance carrier Federated Mutual Insurance Company for a January 31, 1998 accidental injury and against

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[11] *Copeland, supra.*

[12] K.S.A. 1998 Supp. 44-510e.

respondent and its insurance carrier Fire & Casualty Insurance Company for a February 10, 1999 accidental injury.

For the January 31, 1998 accident, claimant is entitled to an award against respondent and its insurance carrier Federated Mutual Insurance Company for 8.3 weeks permanent partial disability compensation at the rate of $351 per week totaling $2,913.30 for a 2 percent functional impairment.

For the February 10, 1999, accident, claimant is entitled to 5.43 weeks temporary total disability compensation at the rate of $366 per week in the amount of $1,987.38, followed by 69.43 weeks permanent partial disability compensation at the rate of $366 per week totaling $25,411.38 for a 40.5 percent permanent partial disability, followed thereafter by 12.86 weeks permanent partial disability compensation at the rate of $366 per week totaling $4,706.76 for a 29.5 percent permanent partial disability, for a total award of $32,105.52. As noted above, as of November 3, 2000, claimant is limited to his functional impairment which has been paid in full, and any additional payments cease as of that date.

As of the date of this award, the entire amount is due and owing in one lump sum minus any amounts previously paid.

IT IS SO ORDERED.

Dated this ____ day of November 2002.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

DISSENT

I respectfully disagree with the majority and would find that claimant's work disability was caused by the first accident rather than the second. Although the record is not

particularly strong as to which accident set claimant's level of disability, Dr. Brown's testimony is uncontradicted that the second accident did not change claimant's need for medical restrictions. Accordingly, I believe *Surls*[13] requires the work disability to be assessed to the January 1998 accident.

As indicated in the February 28, 2001 Award, claimant did not return to the doctor for a final release or permanent work restrictions after completing physical therapy shortly following the January 31, 1998 accident. But claimant continued to work for respondent. Moreover, claimant continued experiencing back symptoms, which caused him to limit his work activities.

On February 10, 1999, claimant sustained the second accident. Following that accident, claimant was off work for medical treatment. Before claimant could recover from the accident and could return to work, the respondent laid him off.

Although the evidence is somewhat scant regarding claimant's ability to work following the first accident as compared to his ability to work following the second accident, Dr. Brown's testimony indicates that claimant's work restrictions and limitations did not change due to the latter.

The doctor's August 1, 2000 letter to Mr. Torline reads:

> In response to your July 11, 2000 letter to me I have reviewed this man's medical file. The work restrictions of 75 pounds occasional lifting, 40 pounds frequent lifting and restriction of flexion more than 30 degrees would be appropriate to either of the injuries and in my opinion would apply equally to these. In other words I would have suggested the same work restrictions following each of the two injuries irrespective of the other. If there are further questions please let me know.

There is really no other evidence to contradict Dr. Brown's conclusion regarding how the first accident affected claimant's overall ability to work. Accordingly, claimant's January 1998 accident set the level of claimant's work disability (a permanent partial general disability greater than the functional impairment rating). The outcome of this claim is controlled by *Surls*.

In summary, according to the record presented, claimant's ability to work was not affected by the February 1999 accident. Based upon the uncontradicted testimony of Dr. Brown, claimant was able to perform the same tasks following the second accident that he was able to perform following the first accident. Accordingly, claimant should receive

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[13] *Surls, supra.*

a work disability for the January 1998 accident, but only permanent disability benefits for his functional impairment rating for the February 1999 accident.

BOARD MEMBER

c: Dale V. Slape, Attorney for Claimant
Terry J. Torline, Attorney for Respondent
Vincent A. Burnett, Attorney for Respondent
Bruce E. Moore, Administrative Law Judge
Director, Division of Workers Compensation